

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., et al.)	
)	
Defendants.)	
)	

**DEFENDANTS’ JOINT MOTION IN LIMINE TO PRECLUDE PLAINTIFFS
FROM REFERRING TO OR IDENTIFYING POULTRY OPERATIONS IN THE
ILLINOIS RIVER WATERSHED AS CONCENTRATED ANIMAL
FEEDING OPERATIONS OR “CAFOS”**

Come now Defendants Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., George’s, Inc., George’s Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, Simmons Foods, Inc., Cal-Maine Foods, Inc., and Cal-Maine Farms, Inc (the “Defendants”) and hereby move *in limine* pursuant to Federal Rules of Evidence 402 and 403 that Plaintiffs, their counsel, and any witness offered by Plaintiffs be precluded from directly or by inference referring to or identifying independent poultry growing operations in the Illinois River Watershed (“IRW”) as concentrated animal feeding operations (“CAFOs”). In support thereof, Defendants state:

1. Evidence should be excluded if the probative value is substantially outweighed by considerations of trial efficiency, confusion of the issues, misleading the jury, or potential unfair prejudice to the Defendants. *See* F.R.E. 403. Any reference to an independent poultry growing operation located in the IRW as a CAFO is unfairly prejudicial and potentially confusing. Moreover, any evidence or testimony referring to a poultry growing operation as a CAFO is

irrelevant under Rule 402.

2. In Count 9 of their Second Amended Complaint, Plaintiffs allege that every instance of wrongful poultry waste disposal, “to the extent the poultry waste disposal practice occurred on land owned or leased by the owner of a poultry growing operation subject to Oklahoma Concentrated Animal Feeding Operation Act, 2 Okla. Stat. § 9-200, *et seq.*, constitutes a violation of the Animal Waste Management Plan criteria set forth in the Oklahoma Administrative Code, § 35:17-3-14.” *See* Dkt. No. 1215.

3. Under the Oklahoma Concentrated Animal Feeding Operations Act, large farms are defined as CAFOs. *See* 2 Okla. Stat. § 22-20-41(B)(11) (defining as a CAFO farms that have “100,000 laying hens or broilers, if the facility has continuous overflow watering”). CAFOs “are point sources subject to the license program established pursuant to the provisions of the Oklahoma Concentrated Animal Feeding Operations Act.” 2 Okla. Stat. § 20-41(A). These licensure requirements place a number of restrictions on CAFOs and their use of manure. Plaintiffs have conceded that very few independent contract grower operations in the IRW fall under the statutory definitions for CAFOs:

Q Are there any other poultry CAFOs in the Illinois River watershed other than L & G Farms currently?

A Not that I'm aware of currently.

Q Okay. Other than the Kendall Country Farms, are you aware of any CAFOs in the IRW historically?

A We have two that are currently licensed as state CAFOs, not as NPDS.

Q Okay. Who are those?

A Cobb-Vantress, Three Springs Farm.

Q Okay, and who is the second one?

A Winner Poultry and Dairy.

Q Do you know what integrator the Winner Poultry and Dairy farm is associated with?

A He does not currently have any birds.

Teena Gunter Depo., 70:11-25 (August 27, 2008) (Ex. A).

4. The Oklahoma CAFO Act contemplates circumstances under which a poultry operation that otherwise fails to meet the statutory definition for CAFOs could nonetheless be designated as a CAFO by the Oklahoma Department of Food & Forestry. 2. Okla. Stat. 20-44(C)(1). For example, the State may designate a poultry farm a CAFO (and thus subject the farm to additional permitting requirements) if the State concludes that the farm is “a significant contributor of pollution to waters of the state.” 2 Okla. Stat. 20-44(A)(3) & (C)(1). Plaintiffs, however, could not identify a single poultry operation that the State has designated as a CAFO under these provisions:

Q Okay. Do you know of any poultry operations in the Illinois River watershed that have been subject to this provision, this 9-202, or the current version?

A Not that I'm aware of.

Q Okay, and that's time immemorial from the enactment of the CAFO Act to the present time?

A I made inquiries of people that have been involved with the program over the years, and no one could remember one.

Q Okay. So there's not ever been a poultry operation in the Illinois River watershed not subject to the CAFO Act that's been designated as a CAFO?

MR. LENNINGTON: Objection, asked and answered.

A Based on my interviews of everyone that would have known that.

Gunter Depo., 92:6-23.

5. For these reasons, on May 12, 2009, Plaintiffs dismissed Count 9 of their Second

Amended Complaint with prejudice pursuant to Rule 41(a)(2). *See* Dkt. No. 2041. Issues involving violations of the Oklahoma CAFO Act and each individual farm or operation's classification as a CAFO are no longer before the Court, except as a defense to note that the State has a regulatory program for restricting the operations of any farm which is "a significant contributor of pollution to waters of the state," 2 Okla. Stat. 20-44(A)(3) & (C)(1), and that Oklahoma has not identified any such farms.

6. The term CAFO often invokes negative connotations and images of a farm or operation inconsistent with the actual nature of the majority of independent contract grower operations in the IRW. Referring to these farms as CAFOs, whether directly or by inference, would be misleading, confusing and highly prejudicial. Further, considering Plaintiffs dismissal of Count 9 of their Second Amended Complaint, there is little probative value in referring to independent contract grower operations in the IRW as CAFOs. Accordingly, such references and inferences are inadmissible under Rules 402 and 403 of the Federal Rules of Evidence.

WEREFORE, Defendants move the Court for precautionary instructions preventing Plaintiffs' counsel, witnesses or experts, from directly or by inference referring to or identifying poultry operations in the IRW as Concentrated Animal Feeding Operations or CAFOs.

Respectfully submitted,

BY: /s/ Michael R. Bond
 Michael R. Bond, *appearing pro hac vice*
 Erin Thompson, *appearing pro hac vice*
 Dustin R. Darst, *appearing pro hac vice*
 KUTAK ROCK LLP
 234 East Millsap Road, Suite 400
 Fayetteville, Arkansas 72703-4099
 (479) 973-4200 Telephone
 (479) 973-0007 Facsimile

-and-

Robert W. George, OBA #18562
Bryan Burns, *appearing pro hac vice*
TYSON FOODS, INC.
2210 West Oaklawn Drive
Springdale, Arkansas 72762
(479) 290-4067 Telephone
(479) 290-7967 Facsimile

-and-

Patrick M. Ryan, OBA # 7864
Stephen L. Jantzen, OBA # 16247
Paula M. Buchwald, OBA # 20464
RYAN, WHALEY & COLDIRON, P.C.
119 North Robinson, Suite 900
Oklahoma City, Oklahoma 73102
(405) 239-6040 Telephone
(405) 239-6766 Facsimile

-and-

Jay T. Jorgensen, *appearing pro hac vice*
Thomas C. Green, *appearing pro hac vice*
Mark D. Hopson, *appearing pro hac vice*
Gordon Todd, *appearing pro hac vice*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
(202) 736-8000 Telephone
(202) 736-8711 Facsimile

Attorneys for Defendants Tyson Foods,
Inc., Tyson Chicken, Inc., Tyson Poultry,
Inc., and Cobb-Vantress, Inc.

BY: /s/James M. Graves

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

Woodson W. Bassett III
Gary V. Weeks
James M. Graves
K.C. Dupps Tucker
BASSETT LAW FIRM
P.O. Box 3618
Fayetteville, AR 72702-3618
Telephone: (479) 521-9996
Facsimile: (479) 521-9600

-and-

Randall E. Rose, OBA #7753
George W. Owens
OWENS LAW FIRM, P.C.
234 W. 13th Street
Tulsa, OK 74119
Telephone: (918) 587-0021
Facsimile: (918) 587-6111

Attorneys for George's, Inc. and George's
Farms, Inc.

BY: /s/ A. Scott McDaniel

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

A. Scott McDaniel, OBA #16460
Nicole M. Longwell, OBA #18771
Philip D. Hixon, OBA #19121
MCDANIEL, HIXON, LONGWELL
& ACORD, PLLC
320 South Boston Ave., Ste. 700
Tulsa, OK 74103
Telephone: (918) 382-9200
Facsimile: (918) 382-9282

-and-

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
Telephone: (501) 688-8800
Facsimile: (501) 688-8807

Attorneys for Peterson Farms, Inc.

BY: /s/ John R. Elrod

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

John R. Elrod
Vicki Bronson, OBA #20574
P. Joshua Wisley
CONNER & WINTERS, L.L.P.
211 East Dickson Street
Fayetteville, AR 72701

Telephone: (479) 582-5711
Facsimile: (479) 587-1426

-and-

Bruce W. Freeman
D. Richard Funk
CONNER & WINTERS, L.L.P.
4000 One Williams Center
Tulsa, OK 74172
Telephone: (918) 586-5711
Facsimile: (918) 586-8553

Attorneys for Simmons Foods, Inc.

BY: /s/ Robert P. Redemann
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
Robert P. Redemann, OBA #7454
PERRINE, MCGIVERN, REDEMANN,
REID, BERRY & TAYLOR, P.L.L.C.
Post Office Box 1710
Tulsa, OK 74101-1710
Telephone: (918) 382-1400
Facsimile: (918) 382-1499

-and-

Robert E. Sanders
Stephen Williams
YOUNG WILLIAMS P.A.
Post Office Box 23059
Jackson, MS 39225-3059
Telephone: (601) 948-6100
Facsimile: (601) 355-6136

Attorneys for Cal-Maine Farms, Inc. and
Cal-Maine Foods, Inc.

BY: /s/ John H. Tucker
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
John H. Tucker, OBA #9110
Theresa Noble Hill, OBA #19119
RHODES, HIERONYMUS, JONES, TUCKER &
GABLE, PLLC

100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Telephone: (918) 582-1173
Facsimile: (918) 592-3390

-and-

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
Todd P. Walker
Melissa C. Collins
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: (612) 766-7000
Facsimile: (612) 766-1600

-and-

Dara D. Mann
MCKENNA, LONG & ADLRIDGE, LLP
303 Peachtree Street, NE
Suite 5300
Atlanta, GA 30308
Telephone: (404) 527-8579
Facsimile: (404) 527-8849

Attorneys for Cargill, Inc. and Cargill
Turkey Production, LLC

CERTIFICATE OF SERVICE

I certify that on the 5th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General
Kelly Hunter Burch, Assistant Attorney General

drew_edmondson@oag.state.ok.us
kelly_burch@oag.state.ok.us

Douglas Allen Wilson
Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
Robert Allen Nance
Dorothy Sharon Gentry
Joseph P. Lennart
David P. Page
RIGGS ABNEY NEAL TURPEN ORBISON & LEWIS

doug_wilson@riggsabney.com
driggs@riggsabney.com
rgarren@riggsabney.com
sweaver@riggsabney.com
rnance@riggsabney.com
sgentry@riggsabney.com
jlennart@riggsabney.com
dpage@riggsabney.com

Louis W. Bullock
Robert M. Blakemore
BULLOCK BULLOCK & BLAKEMORE, PLLC

lbullock@bullock-blakemore.com
bblakemore@bullock-blakemore.com

Frederick C. Baker
William H. Narwold
Elizabeth C. Ward
Elizabeth Claire Xidis
Ingrid L. Moll
Jonathan D. Orent
Michael G. Rousseau
Fidelma L. Fitzpatrick
MOTLEY RICE, LLC

fbaker@motleyrice.com
bnarwold@motleyrice.com
lward@motleyrice.com
cxidis@motleyrice.com
imoll@motleyrice.com
jorent@motleyrice.com
mrousseau@motleyrice.com
ffitzpatrick@motleyrice.com

COUNSEL FOR PLAINTIFFS

A. Scott McDaniel
Nicole Longwell
Philip D. Hixon
Craig A. Mirkes
MCDANIEL HIXON LONGWELL & ACORD, PLLC

smcdaniel@mhla-law.com
nlongwell@mhla-law.com
phixon@mhla-law.com
cmirkes@mhla-law.com

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC
COUNSEL FOR PETERSON FARMS, INC.

sbartley@mwsgw.com

Robert P. Redemann
David C. Senger
PERRINE, MCGIVERN, REDEMANN, REID, BERRY & TAYLOR, PLLC

rredemann@pmrlaw.net
dsenger@pmrlaw.net

Robert E. Sanders

rsanders@youngwilliams.com

E. Stephen Williams
YOUNG WILLIAMS P.A.

steve.williams@youngwilliams.com

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens
Randall E. Rose
THE OWENS LAW FIRM, P.C.

gwo@owenslawfirmmpc.com
rer@owenslawfirmmpc.com

James M. Graves
Gary V. Weeks
Woody Bassett
K.C. Dupps Tucker
Earl Lee "Buddy" Chadick
Vince Chadick
BASSETT LAW FIRM

jgraves@bassettlawfirm.com
gweeks@bassettlawfirm.com
wbassett@bassettlawfirm.com
kctucker@bassettlawfirm.com
bchadick@bassettlawfirm.com
vchadick@bassettlawfirm.com

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod
Vicki Bronson
Bruce W. Freeman
D. Richard Funk
P. Joshua Wisley
CONNER & WINTERS, PLLC

jelrod@cwlaw.com
vbronson@cwlaw.com
bfreeman@cwlaw.com
dfunk@cwlaw.com
jwisley@cwlaw.com

COUNSEL FOR SIMMONS FOODS, INC.

John H. Tucker
Colin H. Tucker
Theresa Noble Hill
Kerry R. Lewis
Colin C. Deihl
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

jtucker@rhodesokla.com
chtucker@rhodesokla.com
thill@rhodesokla.com
klewiscourts@rhodesokla.com

Terry W. West
THE WEST LAW FIRM

terry@thewestlawfirm.com

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
Todd P. Walker
Melissa C. Collins
FAEGRE & BENSON LLP
Dara D. Mann

dehrich@faegre.com
bjones@faegre.com
kklee@faegre.com
twalker@faegre.com
mcollins@faegre.com

MCKENNA, LONG & ADLRIDGE, LLP

dmann@mckennalong.com

COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

J.D. Strong
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

/s/ Michael R. Bond

Michael R. Bond